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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CASE NO. _____

STATE OF FLORIDA,

Petitioner,

-vs-

WILLIE CLAYTON SIMPSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I.

WHETHER THE FLORIDA SUPREME COURT CORRECTLY CONCLUDED THAT THE RIGHT AGAINST SELF-INCRIMINATION GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS APPLIED TO A DEFENDANT WHO WAS CROSS-EXAMINED AT TRIAL ABOUT HIS SILENCE AT A PRIOR PRELIMINARY HEARING FOR ANOTHER INDIVIDUAL AT A TIME WHEN THE DEFENDANT HAD NOT BEEN ARRESTED, HAD NOT RECEIVED MIRANDA WARNINGS, AND WAS NOT EVEN A SUSPECT?

II.

WHETHER THE FLORIDA SUPREME COURT CORRECTLY REFUSED TO APPLY THE HARMLESS ERROR DOCTRINE TO DETERMINE WHETHER ALLEGEDLY IMPROPER COMMENTS AND TESTIMONY ABOUT A DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT CONSTITUTED REVERSIBLE ERROR?

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STATE OF FLORIDA,

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WILLIE CLAYTON SIMPSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

The Attorney General of the State of Florida petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Florida in this case.

OPINIONS BELOW

The official opinion of the Supreme Court of Florida has not yet been reported.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Florida was entered on April 8, 1982, and the State's Motion for Rehearing was denied on September 15, 1982.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3) because the Florida Supreme Court has decided a substantial federal question in a manner contrary to applicable decisions of this Court as well as several federal courts of appeals. The opinion upon which review is sought is final even though a retrial has been ordered because should Respondent be acquitted, under Florida law, the State would be unable to appeal. See Miranda v. Arizona, 384 U.S. 436, 498, n. 71 (1966), where the Court explained that it had jurisdiction in the companion case of California v. Stewart for this reason.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The Fifth Amendment to the Federal Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

The Fourteenth Amendment to the Federal Constitution provides in pertinent part that no state:

> . . . shall deprive any person of life, liberty, or property, without due process of law.

Florida Rule Criminal Procedure 3.140(a)(1) provides:

> (a) METHODS OF PROSECUTION.
>
> (1) CAPITAL CRIMES. An offense which may be punished by death shall be prosecuted by indictment.

Florida Rule Criminal Procedure 3.131(b)(1) provides:

> (b) ADVERSARY PRELIMINARY HEARING.
>
> (1) WHEN APPLICABLE. A defendant who is not charged in an information or indictment within 21 days from the date of his arrest or service of the capias upon him shall have a right to an adversary preliminary hearing on any felony charge then pending against him. The subsequent filing of an information or indictment shall not eliminate a defendant's entitlement to this proceeding.

Section 924:33, Fla. Stat. provides that:

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

STATEMENT OF THE CASE

A.

HISTORY OF THE CASE

Willie Clayton Simpson was indicted for the August 10, 1974, murder of police officer John Kennedy. After a trial by jury, he was found guilty as charged on March 10, 1976, and on May 17, 1976, was capitally sentenced after the jury recommended a sentence of death.

Respondent Simpson filed a direct appeal raising numerous issues in the Supreme Court of Florida. In a written opinion rendered on April 8, 1982, the Supreme Court of Florida reversed Respondent's conviction and ordered that a new trial be held. The State of Florida moved for rehearing and urged that the court had misinterpreted the facts of Respondent's case and also that the Florida

Supreme Court had erroneously refused to consider the harmless error doctrine as it applied to the particular facts and circumstances of Respondent's case. On September 15, 1982, rehearing was denied, however, the court did issue a revised opinion (A-1).

B.

STATEMENT OF THE FACTS

Respondent was arrested and given an initial appearance on December 16, 1974, for a homicide which was unrelated to this case. While he was incarcerated awaiting trial for that murder, he formulated a plan by which he could obtain immunity for the first murder. He contacted representatives of the Palm Beach County Sheriff's Department and offered to provide information about the murder of Officer Kennedy in exchange for immunity for the

charges under which he was then incarcerated.

Respondent falsely accused an individual named Jimmy Lee Harold, and he agreed to testify against Harold at Harold's preliminary hearing.[1] At Jimmy Lee Harold's preliminary hearing, Respondent refused to testify because the State refused to grant him immunity for the murder charges under which Respondent at that time was incarcerated. As a result of Respondent's refusal to testify, the trial court was unable to find probable cause to hold Jimmy Lee Harold, and charges against him were dismissed. This shifted the

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[1] Under Florida law, a defendant charged with a capital crime must be indicted by a grand jury. Florida Rule Criminal Procedure 3.140(a)(1). If a capitally charged defendant has not been indicted within twenty-one days of his arrest, the State is required to afford the defendant an adversary preliminary hearing.

investigation to Respondent who was subsequently arrested nine months later for the murder of Officer Kennedy.

After Respondent had been convicted and sentenced, he filed a direct appeal in the Supreme Court of Florida in which he undoubtedly misstated he had exercised his fifth amendment right to remain silent at a grand jury proceeding investigating the murder of the police officer. See Brief of Appellant filed in the Supreme Court of Florida at pp. 13-16. Respondent specifically argued that he "clearly had the right to remain silent before the grand jury as no immunity had been extended..." (Brief of Appellant in the Florida Supreme Court at 14). He cited Doyle v. Ohio, 426 U.S. 610 (1976), and he argued that since the error was of constitutional dimensions, "the harmless error rule was

not applicable." (Brief of Appellant in the Florida Supreme Court at 15.)

The Supreme Court of Florida then reversed Respondent's conviction and accepted Respondent's argument in full without regard to the harmless error doctrine:

> Appellant raises numerous issues on appeal, however, we find one to be dispositive of the entire matter. Appellant argues that it was harmful error for the prosecutor to elicit from him during cross-examination, testimony concerning his failure to testify before the grand jury investigating this crime, and that the prosecutor's reference during closing argument to such failure to testify was equally harmful.
>
> We agree.

Simpson v. State, ___So.2d___, Case No. 49,681 (Fla., opinion filed Sept. 15, 1982).

On rehearing, the State of Florida vigorously urged that Respondent had never been called to testify at any grand jury

investigating any crime and that the allegedly improper comments had referred to Respondent's silence at another defendant's preliminary hearing at a time when Respondent had not been arrested, had not received his Miranda warnings, and was not even a suspect for the crime for which he was ultimately convicted. The State of Florida relied extensively on Jenkins v. Anderson, 447 U.S. 231 (1980), to support its argument that the United States Constitution did not forbid comment about prearrest silence at a time when the "insoluble ambiguity" condemned by Doyle v. Ohio, supra, could not possibly exist.

It is critical that this Court recognize the true facts of this case in that Respondent remained silent at a preliminary hearing for someone else rather than at the grand jury which indicted Respondent. In that regard, this Court

does not have to accept the Florida Supreme Court's erroneous characterization of the facts. See Whitus v. Georgia, 385 U.S. 545 (1967), in which this Court recognized that although a state court's factual conclusions were entitled to great respect, this Court had a duty to make an independent inquiry in order to determine the facts which were disputed by the parties. See also Time, Inc. v. Firestone, 424 U.S. 448 (1976), in which the Court explained that its usual deference to a state court's factual conclusion was predicated upon a belief that the State fact finder had made a conscious determination of the existence or non-existence of a critical fact. It should be noted that in Respondent's Response to Motion for Rehearing, it was never disputed that Respondent had misstated the facts in his initial brief, but instead Respondent

argued that he "drew reasonable inferences and commented on the legal implications of those comments." (Response to Motion for Rehearing at 1.)

In order that the Court be able to determine the correct facts of this case, the State of Florida has requested the Supreme Court of Florida to forward selected portions of the record on appeal to this Court pursuant to Rule 19.1. Support for the State's position can be found in the affidavits of Harold's defense counsel and the court reporter which were appended to the State's Motion for Rehearing. Both of these individuals were present at Harold's preliminary hearing. Also, it is apparent from the portion of the trial colloquy quoted by the Florida Supreme Court that the prosecutor was referring to Harold's preliminary hearing

rather than a grand jury which indicted Respondent (A-8,9).

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

THE FLORIDA SUPREME COURT IGNORED THIS COURT'S CONTROLLING PRECEDENT IN JENKINS V. ANDERSON, 447 U.S. 231 (1980), WHEN IT HELD THAT THE UNITED STATES CONSITUTION PREVENTED THE PROSECUTION FROM IMPEACHING A DEFENDANT'S CREDIBILITY BY CROSS-EXAMINING HIM ABOUT HIS PREARREST SILENCE.

In Jenkins v. Anderson, 447 U.S. 231, 241 (1980), this Court held that the use of a defendant's prearrest silence to impeach his credibility does not violate the Constitution. In reaching this conclusion, the Court relied upon its prior opinion in Raffel v. United States, 271 U.S. 474 (1926), which "clearly permits impeachment even if the prearrest silence were held to be an invocation of the Fifth Amendment right to remain silent." Jenkins v. Anderson, supra,

at 447 U.S. 236, n.2. See also Johnson v. United States, 318 U.S. 189, 196 (1943), in which the Court stated that it would not have been error for a trial court to disallow a defendant from using the Fifth Amendment to shield himself from certain questions during cross-examination, thus allowing adverse inferences to be made from the fact that the defendant failed to testify.

In spite of these cases, the Florida Supreme Court extended its previous opinions which had concluded that Miranda v. Arizona, 384 U.S. 436 (1966) and Doyle v. Ohio, 426 U.S. 610 (1976), required a finding of reversible error in all cases in which the prosecution has referred to a defendant's silence. The Florida Supreme Court has now held that

reversible error occurs regardless of whether the silence occurred at a time when the defendant had not been arrested, had not received his Miranda warnings, and was not even a suspect for the crime for which he was ultimately convicted. In Respondent Simpson's case, the lower court explained that its position "with respect to the Fifth Amendment right to silence is quite clear."[2] Simpson,

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[2] The Florida Supreme Court has inexplicably refused to recognize that Doyle was decided upon due process grounds because it was unfair for a state to rely at trial on the insoluble ambiguity created by the affirmative assurances of the Miranda warnings. Thus, the court is unable to determine whether a violation of due process has occurred depending on when and under what circumstances a defendant has remained silent. Instead, the Florida Supreme Court has misconstrued Doyle to mean that per se reversible error occurs whenever a defendant's right to silence is brought out at trial; the court has chosen not even to discuss whether the defendant was or should have been Mirandized.

supra, slip opinion on rehearing at 2. The court quoted from Jones v. State, 200 So.2d 574 (Fla. 3d DCA 1967), which had directly quoted from Miranda v. Arizona for the proposition that the prosecution could not use at trial the fact that a defendant stood mute or claimed his privilege in the face of accusation. The lower court then explained that it had used Jones (and Miranda) in Bennett v. State, 366 So.2d 41 (Fla. 1975), which had correctly found that it was reversible error for the State to elicit testimony that a defendant had refused to sign a waiver of his Miranda rights. The court quoted from Willinsky v. State, 360 So.2d 760 (Fla. 1978), which had extended Bennett to hold that cross-examination of a defendant about his silence at a

preliminary hearing was a denial of due process in light of Doyle v. Ohio, supra and United States v. Hale, 422 U.S. 171 (1975). The lower court in Willinsky concluded that the essence of this Court's holdings reflected a general policy that the disclosure of the exercise of the right to remain silent was a denial of due process "at any stage where the right to silence is protected." Willinsky, supra, at 360 So.2d 762.

Therefore, it is clear that the Florida Supreme Court has refused to acknowledge this Court's decision in Jenkins v. Anderson, supra, which clearly holds contrary to the results reached in Respondent's case. In other words, the Florida Supreme Court has refused to make a distinction between cases which involve silence

after Miranda warnings have been given as opposed to cases which involve silence prior to the giving of Miranda warnings. As this Court has previously explained, the reason for the distinction is that the giving of the Miranda warnings creates an "insoluble ambiguity" from which it is not possible to determine later why the defendant had remained silent -- was it because he was guilty or was it because he was relying upon the Miranda warnings? See Fletcher v. Weir, ___U.S.___, 71 L.Ed.2d 490 (1982), which is this Court's most recent pronouncement of the reason why there is a distinction between its post-Doyle cases which involved prearrest silence and cases involving post-arrest silence like Doyle. Compare Roberts v. United States, 445

U.S. 522, 561 (1980), in which the Court observed that the post-conviction, presentencing silence of a defendant did not resemble post-arrest silence which might have been induced solely by the assurances contained in the Miranda warnings.

In Fletcher this Court emphasized that the use of silence for impeachment was fundamentally unfair in Doyle only because the Government might have induced the silence by the giving of Miranda warnings. In Respondent's case, unlike the situation in Doyle, the defendant was impeached with his silence which had occurred at someone else's preliminary hearing. It is significant to note that this preliminary hearing occurred only because Respondent had falsely accused another defendant of

committing the crime for which Respondent was ultimately convicted. When Respondent learned that he was not going to receive immunity for the crime for which he was incarcerated at that time (a charge unrelated to the conviction in this case), he refused to testify at the second defendant's preliminary hearing.

This is clearly not a case in which a defendant could say that his silence might have been induced by the "affirmative assurances" stemming from the Miranda warnings. Indeed, Respondent Simpson was not even arrested until nine months after he failed to testify at the second defendant's preliminary hearing.

The State of Florida fully recognizes that there is nothing in the United States Constitution which

would prevent the states from enacting constitutional or evidentiary provisions which would bar the use of a defendant's prearrest silence for impeachment purposes. Jenkins v. Anderson, at 447 U.S. 240; Fletcher v. Weir, supra. However this is not such a case -- Florida's appellate courts have held that Florida's Due Process Clause found in Article I, Section 9 of the Florida Constitution, affords the same protection as the Fifth Amendment to the United States Constitution. State v. Tsavaris, 382 So.2d 56, 68 (Fla. 2d DCA 1980), affirmed, 394 So.2d 418 (Fla. 1981). Moreover, it is readily apparent from the face of the Florida Supreme Court's opinion in Respondent's case that its position "with respect to the Fifth Amendment right to silence is

quite clear." Simpson, slip opinion at 1, 2. The Court relied upon Miranda, supra and Doyle v. Ohio, supra, and there was no mention of the Florida Constitution or of any Florida evidentiary rule which would prevent the State from impeaching a defendant with his prearrest silence.[3]

This Court should not countenance the Florida Supreme Court's extension

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[3] Should Respondent attempt to argue that Florida has placed greater restrictions on the use of a defendant's silence than the restrictions embodied in the United States Constitution, thus asserting a jurisdictional bar of state law, that argument would be refuted by Oregon v. Hass, 420 U.S. 714, 719 (1975). In that case, Justice Blackmun reiterated that "a State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them." Moreover, in Respondent's case, as in Oregon v. Hass, the decision was based upon the Fifth and Fourteenth Amendments, and no mention was made of the state constitution.

of Miranda and Doyle to situations in which this Court has already clearly stated that the Due Process Clause of the United States Constitution has not been violated, i.e., situations involving prearrest silence at a time when the silence could not possibly have been induced by the affirmative assurances of the Miranda warnings. The Florida Supreme Court has misconstrued this Court's holding in Doyle and ignored this Court's opinion in Jenkins v. Anderson, even though that case was cited extensively in the State's Motion for Rehearing. The Court also ignored Fletcher v. Weir, supra, which was provided as supplemental authority after the State's Motion for Rehearing was filed.

The State of Florida submits that this Court should grant certiorari and vacate the opinion of the Florida Supreme Court, and direct that that court reconsider its opinion in light of Jenkins v. Anderson, Raffel v. United States, and Fletcher v. Weir.

II.

THE FLORIDA SUPREME COURT REFUSED TO CONSIDER WHETHER TO APPLY THE HARMLESS ERROR DOCTRINE IN RESPONDENT SIMPSON'S CASE.

In Chapman v. California, 386 U.S. 18, 22 (1967), the Court categorically refused to adopt a rule that would make all federal constitutional errors, regardless of the facts and circumstances, per se reversible error. Yet, the Florida Supreme Court has refused to evaluate the facts and circumstances of Respondent's case to determine whether the constitutional error it erroneously found existed could be deemed harmless beyond a

reasonable doubt as was discussed in Chapman.[4] In accord, Doyle v. Ohio, at 426 U.S. 620.

In Respondent Simpson's case, the Supreme Court of Florida relied upon its prior decision in Bennett v. State, supra, which, in turn, had relied upon Jones v. State, supra, that had held that "any comment upon the defendant's standing mute, or refusing to testify, in the face of an accusation was fundamental error requiring a new trial." Bennett, supra, at 316 So.2d 42. The Supreme Court of Florida then concluded that the error "was of constitutional dimension and warrants reversal

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[4] Florida's harmless error doctrine has been codified in §924.33, Fla. Stat., which has been reproduced in its entirety in the constitutional and statutory provisions section of this brief.

without consideration of the doctrine of harmless error." Id. at 316 So.2d 44. Several years later, in Willinsky, supra, the Court relied upon Bennett when it held "that the harmless error rule is not applicable to disclosure of the accused's silence at a preliminary hearing. Willinsky, supra at 360 So.2d 763. Finally, as recently as July, 1982, the Florida Supreme Court wrote that "[a]ny comment on an accused's exercise of his right to remain silent is reversible error, without regard for the harmless error doctrine." Donovan v. State, 417 So.2d 674, 675 (Fla. 1982).

Therefore, in spite of the fact that this Court has never held that reference to a defendant's prearrest silence is reversible error regardless

of all the facts and circumstances, the Supreme Court of Florida has adopted such a rule. The Florida Supreme Court has in effect handcuffed the lower state appellate courts by the principle of stare decisis even though the lower courts have recognized the incorrectness of the prophylatic rule. See, e.g., Marshall v. State, 393 So.2d 584, 586 (Fla. 1st DCA 1981). In the State's Motion for Rehearing in Respondent's case, the Florida Supreme Court was requested to recede from its "prophylactic rule" and follow the decisions of the federal courts which have recognized that not all comments about a defendant's silence are reversible error without regard to the harmless error doctrine. See e.g., Stone v. Estelle, 556 F.2d 1242 (5th Cir.

1977); Meeks v. Havener, 545 F.2d 9 (6th Cir. 1976); United States v. Staller, 616 F.2d 1284 (5th Cir. 1980). Moreover, even in Doyle v. Ohio itself, the Court recognized that harmless error had not been argued, thus implying that the harmless error doctrine could be applied on a case to case basis depending on the facts and circumstances of each case.

Finally, this Court has recently granted certiorari to consider this issue of whether an appellate court can refuse to consider the propriety of the harmless error doctrine in cases not involving fundamental error. In United States v. Hastings, 660 F.2d 301 (7th Cir. 1981), cert. granted, ___U.S.___, Case No. 81-1463, 32 Cr.L. 4027 (Oct. 6, 1982), the Seventh Circuit, like the Florida

Supreme Court, refused to apply the harmless error doctrine even though there was clear evidence of guilt. The question presented in that case is whether the lower court's refusal to apply the harmless error doctrine was correct.

Accordingly, should the Court decide not to grant certiorari to vacate the lower court's opinion in light of Jenkins v. Anderson, supra, the Court should grant certiorari and hold this case pending resolution of the identical issue presented in United States v. Hastings. See Keney v. New York, 388 U.S. 440 (1967), which provides support for retention of a case while certiorari is pending in a similar case.

CONCLUSION

The Supreme Court of Florida has misconstrued Doyle v. Ohio and made it applicable to cases involving prearrest silence despite this Court's clear pronouncements to the contrary in Jenkins v. Anderson, Fletcher v. Weir, and Raffel v. United States. In Florida, unlike the rest of the country, the prosecution is prevented from impeaching a defendant's credibility by use of the defendant's prior silence even when the silence occurred prior to arrest, prior to the giving of the Miranda warnings, and prior to the defendant's even becoming a suspect. The Court should not countenance the Florida Supreme Court's continued disregard of or inability to understand this Court's controlling precedent. Hutto v. Davis, U.S.___, 70 L.Ed.2d 556 (1982).

Petitioner respectfully submits that this case is appropriate for summary disposition and that the Court should grant certiorari and vacate the opinion of the lower court for reconsideration in light of Jenkins v. Anderson and Fletcher v. Weir. In the alternative, the Court should grant certiorari and hold the case pending disposition of the identical harmless error issue in United States v. Hastings, Case No. 81-1463.

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